Supreme Court, U.S.
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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

NORTHROP CORPORATION,
Petitioner,

v.

TRIAD INTERNATIONAL MARKETING, S.A.,
and TRIAD FINANCIAL ESTABLISHMENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is it contrary to the public policy favoring respect for foreign laws for a federal court to enforce an arbitration award that compels a United States citizen to commit an act illegal under the laws of a foreign nation?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 28.1, petitioner Northrop Corporation lists the following non-wholly-owned subsidiaries or affiliates of Northrop: Northrop Intercontinental, Ltd.; Northrop International Finance N.V.; Northrop Universal, Ltd.; Tiger Insurance Company, I td.; Northrop Overseas Services, Ltd.; and Northrop Technology Enterprise, Co.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Northrop Corporation ("Northrop") hereby petitions this Court to issue a writ of certiorari to review a decision of the Ninth Circuit Court of Appeals issued March 3, 1987. Reversing a judgment of the District Court, the Ninth Circuit held that an arbitration award compelling Northrop to perform a contract that was illegal under the laws of Saudi Arabia violated no public policy of the United States. The Ninth Circuit's decision conflicts with decisions by other courts of appeals that recognize the federal public policy favoring respect for foreign laws, and the decision distorts the proper role of the federal courts in the delicate area of foreign affairs. Accordingly, review by this Court is appropriate.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is reported at 593 F. Supp. 928 (C.D. Cal. 1984) and is appended at Appendix A. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 811 F.2d 1265 (9th Cir. 1987) and is appended at Appendix B. The Order extending until April 1, 1987, Northrop's time to file a rehearing petition is unpublished and is appended at Appendix C. The Order denying Northrop's Petition for Rehearing and Suggestion of Appropriateness of Rehearing In Banc is unpublished and is appended at Appendix D.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its decision on March 3, 1987, and amended it on May 27, 1987. It extended until April 1, 1987, Northrop's time for filing a rehearing petition, and on June 25, 1987, denied Northrop's timely-filed Petition for Rehearing and Suggestion of Appropriateness of Rehearing In Banc. This Petition for Writ of Certiorari was filed within ninety days of the denial of the rehearing petition and is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 20.4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, reads in relevant part:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

* * *

(d) Where the arbitrators exceeded their powers . . . .

STATEMENT OF THE CASE

Pursuant to a Marketing Agreement executed in October 1970 between Northrop and Triad Financial Establishment — an entity controlled by Adnan Khashoggi — Triad acted from 1971 to 1975 as Northrop's marketing agent in Saudi Arabia for sales of arms and related services through the United States Department of Defense ("DOD") to the Government of Saudi Arabia.[1] During this period, Northrop paid more than $17 million in commissions to Triad.

In 1975, in the aftermath of United States congressional hearings disclosing large payments by U.S. defense contractors to foreign brokers, the Government of Saudi Arabia issued several declarations of law, culminating in Decree No. 1275 (the "Saudi Decree"). The Saudi Decree expressly prohibited the use of commission agents by companies contracting to sell arms or related services to the Saudi Government and voided any existing agreements to pay commissions to such agents for past, present, or future services.[2] The DOD issued policy

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[1]In February 1974, Triad Financial Establishment assigned its right to receive payments from Northrop to Triad International Marketing, S.A. Both entities are referred to collectively herein as "Triad."

[2]The Decree provided in relevant part:

> *First:* No company under contract with the Saudi Arabian government for the supply of arms or related equipment shall pay any amount as commission to any middleman, sales agent, representative or broker irrespective of their nationality, and whether the contract was concluded directly between the Saudi

statements requiring U.S. companies to comply with the Saudi Decree. In compliance with these proscriptions, Northrop terminated its Marketing Agreement with Triad in July 1975 and suspended further payment of commissions. Thereafter, Mr. Khashoggi and Triad performed no further services for Northrop.

A. Arbitration Proceedings.

Four years later, in 1979, Triad initiated an arbitration against Northrop seeking recovery of approximately $153 million in commissions, the majority of which allegedly came due after the promulgation of the Saudi Decree. It argued that, because the Marketing Agreement specified that California law would govern the validity and construction of the Agreement, the prohibitions of the Saudi Decree did not excuse Northrop's termination of commission payments. Northrop's fundamental defense was that California law made unenforceable any agreement requiring a party to perform an act illegal under foreign law. It relied on California Civil Code § 1511(1), which provides that "performance of an obligation . . . is excused . . . [w]hen such performance . . . is prevented . . . by the operation of law."

Arabian government and the company or through another state. Any commission arrangement already concluded by any of these companies with any other party shall be considered void and not binding for the Saudi Arabian government;

Second: If any of the foreign companies described in Article I (one) were found to have been under obligation for the payment of commission, payment of such commission shall be suspended after notifying the concerned companies of this decision. Relevant commissions shall be deducted from the total amount of the contract for the account of the Saudi Arabian government.

815 F.2d at 1266 n.1.

The arbitrators rejected Northrop's defense, holding that California law excuses a party's performance only when foreign law renders performance factually impossible, not merely illegal. Notwithstanding any penalties or other retaliation to which further payment of commissions might subject Northrop or its employees in Saudi Arabia, the arbitrators found that Northrop was physically capable of making additional commission payments to Triad. Accordingly, the arbitrators ruled that Triad was entitled to approximately $31 million in past due commissions and interest from Northrop.

B. District Court Proceedings.

Northrop sought to vacate, and Triad sought to confirm, the arbitration award in the United States District Court for the Central District of California. In a decision issued September 7, 1984, Judge Tashima held that the arbitration award was unenforceable on grounds of public policy to the extent it compelled Northrop to make commission payments in violation of Saudi law. 593 F. Supp. 928.

The District Court ruled that it was obliged to consider *de novo* whether the arbitration award was "contrary to law and public policy" and therefore unenforceable. *Id.* at 936 (citing *inter alia W.R. Grace & Co. v. Local Union 759,* 461 U.S. 757 (1983)). The District Court then held that, in compelling Northrop to make commission payments that were illegal under Saudi law, the arbitration award violated public policy. Finding the arbitrators' reading of California law "untenable," the California District Court held:

> Performance prevented by the "operation of law" within the meaning of § 1511 need not be factually impossible. . . . California law does not require a party to violate the law of a foreign jurisdiction in

> order to avoid liability for breach of contract.... The "operation of law" defense set forth in § 1511 is equally applicable to a foreign law.

Id. at 937.

The District Court rejected the contention that the rule excusing performance of a contract that is illegal under foreign law "had no counterpart in federal law or U.S. public policy." *Id.* at 936 n.13.

> [I]t is clear that DOD wished to conform its policy precisely to that announced by Saudi Arabia.... DOD's enforcement of Saudi policy was coercive rather than voluntary, and is properly characterized as U.S. public policy.

Id.

Finally, the District Court concluded that the Saudi Decree flatly prohibited any commission payments by Northrop to Triad for services performed after September 1975. The District Court rejected Triad's argument that the Saudi Decree permitted payment of commissions as long as they were not charged to the Saudi Government.

> The words "No company . . . shall pay," cannot fairly be construed to preclude only those commissions charged to the Saudi government; rather the Decree imposes a *flat ban* upon commission agreements between suppliers and agents in U.S.-Saudi arms contracts.

Id. at 938 (emphasis added). The District Court also rejected Triad's argument that it was not an "intermediary, sales agent, representative or broker" within the meaning of the Saudi Decree: "[I]t is clear that the Saudi Decree reflects a governmental policy *formulated specifically with the Northrop-Triad agency relationship in*

mind." Id. at 939 (emphasis added). Accordingly, the District Court vacated the arbitration award as contrary to law and public policy insofar as it ordered the payment of commissions that came due after the Saudi Decree was promulgated.[3]

C. Court Of Appeals Proceedings.

Following argument in October 1985, the Ninth Circuit reversed the District Court's ruling on March 3, 1987. 811 F.2d 1265. It did not disturb the District Court's findings that the Saudi Decree imposed a "flat ban" on payment of commissions to agents like Triad, that the Decree was "formulated specifically with the Northrop-Triad agency relationship in mind," or that the DOD required Northrop to comply with the Saudi Decree. It also agreed with the District Court that the determination whether an arbitration award is contrary to public policy "is a question for the courts alone to decide," *id.* at 1270; *accord id.* at 1268, and that a federal court must vacate any award that is contrary to a " 'well defined and dominant' " public policy, *id.* at 1271.

Nonetheless, the Ninth Circuit held that an arbitration award compelling a party to perform an act that is illegal under foreign law is not contrary to public policy at all but rather is a matter of concern to the contracting parties alone. The Ninth Circuit reasoned as follows:

> We do not regard section 1511 as a declaration that it is the public policy of the state of California that contracts unenforceable under the laws of any other jurisdiction shall not be enforced in California. Section 1511 is a codification of a rule of purely private law embodying a common-law defense in an action

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[3]The District Court confirmed the award insofar as it related to commissions earned before the Saudi Decree.

> between contracting parties for breach. If the statutory codification of such rules of contract law were regarded as converting them into principles of public policy cognizable only in courts, the capacity of arbitrators to resolve contract disputes would be seriously diminished.

Id. at 1270-71.

The Ninth Circuit also held that the DOD's policy requiring compliance with the Saudi proscriptions was not " 'well defined and dominant' " as required by *W.R. Grace & Co. v. Local 759,* 461 U.S. 757, 766 (1983). 811 F.2d at 1271. Without disturbing the District Court's findings on the content or effect of the DOD policy, the Ninth Circuit stated that the DOD wanted not only to accommodate Saudi dictates but also to encourage sales of American military equipment to Saudi Arabia. Thus, the Ninth Circuit held that, even if the District Court correctly interpreted the DOD policy as "coercive," the policy was not sufficiently well defined and dominant because the DOD pursued "sometimes inconsistent goals." *Id.* at 1271.

In addition to holding that the award was not contrary to public policy, the Ninth Circuit held that the arbitrators' interpretation of California Civil Code § 1511 was not in "manifest disregard of law." The Ninth Circuit found the arbitrators' interpretation of the statute "not unreasonable" and "consistent with the general rule" that " '[i]mpossibility based on foreign law does not fall within the same class as that occasioned by domestic law, and it has generally been held no excuse for breach of contract.' " 811 F.2d at 1270 n.7 (quoting W. Jaeger, 18 *Williston on Contracts* § 1938 at 42-43 (3d ed. 1978)).

REASONS FOR GRANTING THE WRIT

As this Court has made clear, federal courts must not enforce an arbitration award that "violates some explicit public policy" if that policy is "well defined and dominant" and may be "ascertained by 'reference to the laws and legal precedents . . . .' " *W.R. Grace*, 461 U.S. at 766 (citation omitted). Accordingly, it is well settled throughout the circuits that a federal court will not enforce an arbitration award that compels a party to commit an act illegal under *domestic* law. *See, e.g., American Postal Workers Union v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986) ("[I]t is well-understood that courts will not enforce an arbitration award if the award itself . . . seeks to compel some unlawful action."); *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280, 1286 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) ("[T]he courts cannot enforce an arbitrator's award if it requires the performance of an illegal act."). Indeed, where domestic law is concerned, even if an arbitration award does not compel an outright illegal act, it will not be enforced if it nonetheless is contrary to an ascertainable public policy.[4]

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[4] *See, e.g., International Organization of Masters, Mates & Pilots v. Trinidad Corp.*, 803 F.2d 69, 72 (2d Cir. 1986) (court may not confirm award enforcing provision contrary to federal labor laws); *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Keystone Consolidated Industries*, 782 F.2d 1400, 1404 (7th Cir. 1986) (award contrary to public policy reflected in ERISA to protect plan participants from unnecessary termination of pension plans); *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739, 743 (5th Cir. 1985) (award contrary to the public policy encouraging employers to protect the safety of their employees); *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822, 826 (1st Cir. 1984) (award contrary to the public policy of not requiring the Postal Service to reinstate an employee convicted of embezzlement); *Broadway Cab Cooperative, Inc. v. Teamsters & Chauffeurs Local Union No. 281*, 710 F.2d 1379

The issue requiring resolution by this Court is whether a federal court should enforce an arbitration award that compels a United States citizen to commit an act illegal under *foreign* law. The Ninth Circuit held that a federal court's enforcement of such an award violates no cognizable public policy but rather is a matter of concern to the contracting parties alone. This ruling conflicts with numerous holdings in other circuits that properly recognize the federal courts' overriding interest in not compelling U.S. citizens to violate foreign law. The Ninth Circuit's affront to a United States ally in the most volatile region of the world is also contrary to a policy developed by the branch of government entrusted to manage foreign military affairs.

Moreover, as international trade has become increasingly important, arbitration agreements have become ever more common in international transactions, and this Court has significantly expanded the breadth of matters subject to arbitration. As a corollary, independent review by this Court is necessary to ensure that, in enforcing private arbitration agreements, federal courts do not violate fundamental public policy, show disrespect for the laws of foreign sovereigns, or involve the United States in foreign policy conflicts that the executive branch has sought to avoid.

A. The Ninth Circuit's Decision Conflicts With The Rule In Other Circuits That Federal Courts Should Respect The Laws Of Foreign Sovereigns.

The Ninth Circuit ruled that a federal court violates no public policy when it orders a party to commit an act illegal under foreign law. This is contrary to the holdings of other courts — primarily the Second Circuit — which

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(9th Cir. 1983) (award contrary to public policy of federal labor laws).

recognize in a variety of contexts the importance of ensuring that federal court orders respect foreign laws. In *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962), for example, a United States bank resisted a subpoena requesting production in New York of records held by its Panama branch, because Panamanian law forbade production of those records without the consent of local authorities. The Second Circuit wrote:

> [T]he Government argues that compliance will not violate Panamanian law, since the subpoena is not directed to personnel in Panama but only to the head office in New York. . . . [T]his would be nothing more than an attempt to circumvent the Panamanian law. Such a maneuver scarcely reflects the kind of respect which we should accord to the laws of a friendly foreign sovereign state.
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> * * *
>
> ". . . [U]pon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures."

Id. at 613 (citation omitted).

In later cases, the Second Circuit has repeatedly recognized that federal courts must not compel citizens to act in violation of foreign law. *See Trade Development Bank v. Continental Insurance Co.,* 469 F.2d 35, 40 (2d Cir. 1972) (affirming District Court's refusal to order bank to make disclosures illegal under Swiss law "as a matter of comity"); *United States v. First National City Bank,* 396 F.2d 897, 902 (2d Cir. 1968) ("a court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign state affected by its

decision"); *United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962) ("no court should order the performance of an act in a foreign country when that act will violate the foreign country's laws").

Similarly, when one American company alleged antitrust violations by a second American company in securing foreign patents by fraud, the Third Circuit held that it must balance against federal antitrust policies the policy favoring respect for the foreign sovereign's issuance of the patent.

> When foreign nations are involved, . . . it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.

Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1296 (3d Cir. 1979).

That the Ninth Circuit stands alone in its indifference to the laws of foreign sovereigns is underscored by its adherence to an outmoded view of law in its subsidiary holding on Northrop's contractual impossibility defense. The Court cited W. Jaeger, 18 *Williston on Contracts* § 1938 at 42-43 (3d ed. 1978) for "the general rule" that "[i]mpossibility based on foreign law . . . has generally been held no excuse for breach of contract." 811 F.2d at 1270 n.7. The authors of that treatise cite comment b to section 458 of the *original Restatement of Contracts* to the effect that illegality under foreign law was treated as "impossibility of fact" rather than of law. 18 *Williston on Contracts* at 43. Section 458 of the original *Restatement* did indeed limit discharge by "Supervening Prohibition or Prevention by Law" to domestic laws, and comment b indicated that the effect of foreign prohibitions should be

analyzed under the section dealing with factual impossibility. *Restatement of Contracts* § 458 & comment b (1932).

The "rule" cited in Williston and relied upon by the Ninth Circuit, however, has been expressly rejected by most modern courts. Section 264 of the *Restatement (Second) of Contracts,* which supersedes section 458 of the original *Restatement,* provides:

> If the performance of a duty is made impracticable by having to comply with a domestic *or foreign* governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

Restatement (Second) of Contracts § 264 (1982) (emphasis added). Hence, under section 261, the duty to perform the prohibited duty is discharged. *Id.* § 261. Comment a to section 264 expressly rejects the view that "factual impossibility" is required for discharge:

> [I]f supervening governmental action prohibits a performance . . . , the duty to render that performance is discharged . . . . *The fact that it is still possible for a party to perform if he is willing to break the law and risk the consequences does not bar him from claiming discharge.*

Id. § 264, comment a (emphasis added). Comment b expressly rejects any view that the rule is different where the prohibitory law is foreign:

> Under the rule stated in this Section, *the regulation or order may be domestic or foreign.* It may emanate from any level of government . . . .

Id. § 264, comment b (emphasis added).

That the Ninth Circuit does not consider prohibitory foreign law as an excuse for nonperformance of a contract — despite the modern rule to the contrary — underscores

the extent to which its indifference to foreign law is out of line with the views of other courts. In enforcing an arbitration award that compels the performance of an act illegal under foreign law, the Ninth Circuit has refused to recognize the overriding interest of federal courts in avoiding orders offensive to foreign sovereigns. *See generally Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."). Because the Ninth Circuit's ruling creates a conflict on the extent to which respect for foreign laws is a cognizable federal "public policy," review by this Court is warranted.

B. The Extent To Which Arbitration Awards Must Yield To The Public Policy Of Respect For Foreign Laws Requires A Definitive Resolution By This Court.

1. The Ninth Circuit's Ruling Dangerously Injects Federal Courts Into Foreign Policy Controversies.

In cases deciding issues of purely private law, review by the Supreme Court often is best deferred until the views of the majority of circuits are canvassed. The Ninth Circuit's decision in this case, however, so seriously distorts the federal courts' proper role in the delicate area of foreign affairs that prompt review is warranted.

The Middle East is one of the most volatile regions in the world today. Saudi Arabia is one of this country's most important allies in that region. As the undisturbed finding of the District Court makes clear, the Saudi Decree which the Ninth Circuit ordered Northrop to violate was specifically formulated with Northrop and

Triad in mind. Consequently, Northrop's payment of further commissions obviously is not a matter of indifference to the Saudi Government. It is the judgment of the executive branch, as expressed in the policies of the government agency that sold the arms to the Saudi Government, that Northrop should honor the Saudi Decree by refusing to make further commission payments. And of course it is the executive branch that is entrusted to evaluate and foster the foreign policy interests of the United States.

For these reasons, enforcement of this arbitration award could easily damage the United States' foreign policy goals. The more important point, however, is that the foreign policy consequences are likely to be serious whenever a federal court enforces an arbitration award that compels a citizen to violate a foreign law that is not inconsistent with United States policy. The consequences will be still more serious when, as here, the award is actually contrary to express executive branch policies. For these reasons, this is not an issue the Court would wisely leave to prolonged experimentation and conflict among the circuits. Rather, because the potential risks will be large whenever this issue arises, it requires a definitive ruling by this Court.

2. The Ninth Circuit's Ruling Will Jeopardize The Ability Of American Companies To Compete And Perform Work Abroad.

The ruling of the Ninth Circuit will subject American companies operating abroad to a Hobson's choice. When confronted with a foreign law that forbids them to perform some contractual obligation, they will have to either violate the law of the foreign nation, risking punishment and damage to their ability to compete or perform work abroad, or risk an award of damages for breach of contract in an American court. As one court has observed:

> Commerce may exist at the will of the [foreign] government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact business in foreign lands. Were compulsion not a defense, American firms abroad faced with a government order would have to choose one country or the other in which to do business.

Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970). Because it puts American companies to a choice that could jeopardize their ability to compete or perform work abroad, the Ninth Circuit's ruling warrants review by this Court.

3. The Increasing Frequency Of Arbitrations In International Commercial Disputes Makes Review Of The Ninth Circuit's Decision Appropriate.

Over the years this Court has steadily expanded the scope of private dispute resolution through arbitration. It has enlarged the subject matters amenable to arbitration. *E.g., Shearson/American Express, Inc. v. McMahon,* 107 S. Ct. 2332 (1987); *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395 (1967). It has invoked the preemptive effect of the Federal Arbitration Act to invalidate state statutes that undermine the arbitration remedy. *E.g., Perry v. Thomas,* 107 S. Ct. 2520 (1987); *Southland Corp. v. Keating,* 465 U.S. 1 (1984). And it has shown a special willingness to foster arbitration of international commercial disputes. *E.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974).

As the scope of arbitration expands, however, so does the need to police instances when private dispute resolution may offend public interests. In particular, as arbitration of international commercial disputes becomes ever

more common, courts must increasingly be alert for circumstances when enforcement of arbitration awards may intrude on U.S. foreign policy interests. If they fail to do so, they not only will implicate the federal courts in lawless transactions but ultimately will undercut the willingness of domestic and foreign parties to commit to arbitration. Courts agree that arbitration awards that compel acts illegal under domestic law offend public policy. But they require this Court's guidance on the extent to which public policy is offended by enforcement of awards that compel acts illegal under foreign law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

DATED: August 28, 1987

Respectfully submitted,

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APPENDIX A

NORTHROP CORPORATION,
Petitioner,
v.
TRIAD FINANCIAL ESTABLISHMENT
and Triad International Marketing, S.A.,
Respondents.

In the Matter of the Arbitration Between
TRIAD INTERNATIONAL MARKETING,
S.A., et al., *Petitioners,*
and
NORTHROP CORPORATION,
Respondent,
Nos. CV83-7945, CV83-7948.
United States District Court,
C.D. California.
Sept. 4, 1984.

MEMORANDUM OPINION

TASHIMA, District Judge.

These are consolidated actions to, respectively, vacate and confirm an arbitration award against Northrop Corporation ("Northrop") and in favor of Triad Financial Establishment and Triad International Marketing, S.A. (collectively "Triad"). Arbitration was initiated by Triad in 1979. After lengthy proceedings involving Triad's claims to approximately $153 million in commission payments, the arbitration tribunal (the "tribunal") made an award to Triad in the amount of $31,477,378.

BACKGROUND

The Marketing Agreement

On October 4, 1970, in an effort to facilitate the sale by Northrop of fighter aircraft and related equipment to the Kingdom of Saudi Arabia,[1] Northrop and Triad executed a Marketing Agreement (the "Agreement"). The Agreement designated Triad as Northrop's sole representative for the sale of certain specified products and services in Saudi Arabia. Triad was to be paid a commission on consummated sales at a rate varying according to the type of sale and with subsequent agreements between the parties. Direct sales by Northrop to Saudi Arabia were to be compensated at a fixed percentage of the contract price.

The Agreement also contemplated "indirect" sales. These were sales effected through the United States government, which were governed by the Foreign Military Sales Act (now the Arms Export Control Act), 22 U.S.C. § 2751, *et seq.* ("FMS sales" or "indirect sales"). For each FMS sale, Northrop would submit to the United States Department of Defense ("DOD") a "not-to-exceed" price proposal which would serve as the basis for a "Letter of Offer" from DOD to the Government of Saudi Arabia. This offer, once accepted by Saudi Arabia, would be returned to DOD as a "Letter of Offer and Acceptance" ("LOA"). Northrop and DOD then would execute a detailed fixed-price contract which would establish the

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[1]Saudi Arabia first announced its intention to upgrade its Air Force in the mid-1960s. In 1969, after a failed attempt to sell its F-5 and F-5B aircraft, Northrop sought out a local representative to aid it in its effort to sell aircraft to Saudi Arabia. Northrop conducted a survey of middle east sales representatives and selected Adnan Kashoggi, a principal owner of Triad.

final cost to Saudi Arabia of the program covered by the LOA.

Indirect sales were to be compensated at a rate agreed upon by the parties, but not less than one percent of the sales price. The Agreement further provided that commission payments on indirect sales were "subject to the allowability and recognition of such compensation by the United States government."[2]

The Agreement was to continue for a period of one year, and to be extended automatically for an additional five-year period if Northrop procured a contract prior to October 4, 1971.[3]

Beginning in 1971, Northrop entered into a series of contracts with the Saudi government, in what came to be known as the "Peace Hawk Program" ("Peace Hawk" or the "Program"). Northrop made FMS sales of aircraft to the Royal Saudi Air Force ("RSAF") under Phases I, II, IV and VI of the Program, and sold maintenance, construction, training and other support services and material under Phases III, III Extension ("IIIE"), V and VII of the Program. Sales to Saudi Arabia under Peace Hawk Phases I through VII totalled $4.2 billion.

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[2]The Agreement, ¶ 2(g), provided:

> In the event of such [indirect] sales, if permitted by United States law, Northrop shall pay Triad such compensation as the parties shall agree, but no less than one percent (1%) of the sales price, subject to the allowability and recognition of such compensation by the United States government.

[3]Northrop procured its first contract prior to October 4, 1971, and the Agreement was extended to October 4, 1976. A Second Amended Marketing Agreement was entered into on April 14, 1972, containing the same basic provisions, but expanding the product coverage.

FMS Sales

Prior to April 1972, the Saudi government had signed LOAs for Peace Hawk Phases I, II and III. Each LOA contained line items for commission payments to Triad. The amount of commissions for Phases I, II and III also were "recognized and allowed" by DOD as an element of the contract price paid to Northrop by the United States government.[4]

By August 1975, Phases I and II of the Program were completed, and Phase III was nearing completion. In an amendment to the Agreement executed on August 15, 1975, the parties established a schedule for payment by Northrop of all Triad fees earned under Phases II and III.[5] The amendment provided for payment of commissions on May 10, August 10, and November 10, 1975. The May and August commissions were in fact paid by Northrop on August 20. The commissions due on November 10, 1975, were never paid. Northrop denied liability for any outstanding Phase II or Phase III commissions; the issue was submitted to the tribunal for its resolution.

Northrop's Phase IV price proposal to DOD included line items for commission payments to Triad. However, DOD never advised Northrop that the Phase IV commissions had been "recognized and allowed." Nor did DOD

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[4]Following Saudi acceptance of the Phase III LOA, DOD approval of Phase III commissions was withheld pending an investigation by the U.S. Air Force ("USAF") into the nature of the payments. Although DOD allowed Phase III commissions in excess of $5.5 million, the USAF advised Northrop that advance approval of agents' commissions included in FMS sales contracts would in the future require the express written consent of the foreign government in question.

[5]Phase I commissions have been paid and are not here in issue.

include line items for commission payments on the Phase IV LOA signed by the Saudi government on January 4, 1975. Nevertheless, on April 10, 1975, Northrop and Triad signed an advance commission agreement under which Northrop paid $6 million to Triad against commissions which might become due under Phase IV. The agreement also provided that Phase IV commissions would not be subject to recognition and allowance by the U.S. government.

No Phase IV commissions, other than the $6 million advance, were ever paid. In the arbitration proceedings Triad claimed additional commissions on certain Phase IV FMS sales; Northrop counterclaimed for recovery of the $6 million advance commission payment.

Termination of the Marketing Agreement

DOD submitted its Phase V Letter of Offer to the Saudi government in January 1975. On March 6, 1975, Assistant Secretary of Defense Robert Ellsworth wrote to Prince Sultan, Minister of Defense and Aviation for Saudi Arabia, stating that Northrop's Phase V proposal included commission payments to Triad of approximately $45 million. In a written response dated May 17, 1975, Prince Sultan advised DOD that the proposed Phase V commissions were unacceptable and that the use of intermediaries with respect to arms sales to the Saudi government would not be permitted. Thereafter, the Director of the Defense Security Assistance Agency advised Prince Sultan that $23 million in Triad commissions had been included in the Phase IV LOA. By letter dated June 10, 1975, Prince Sultan reiterated his non-acceptance of any intermediary with respect to arms sale contracts and stated that the Saudi government would not allow Phase IV commission payments.

On June 10, 1975, the USAF advised Northrop that it would not be permitted to include commission payments in its Phase IIIE[6] or Phase V price proposals. On June 14, the Saudi Ministry ot Defense and Aviation ("MODA") issued a public proclamation referring explicitly to the Northrop-Triad relationship and stating that the government would not permit the payment of commissions of agents in arms sale contracts. On June 20, 1975, the USAF advised Northrop that agent's fees and commissions would not be recognized and allowed on Phase IV.

On July 9, 1975, DOD amended its Defense Department circular relating to agent's fees to require every supplier acting under contract with DOD for sales to Saudi Arabia and three other countries, to certify that its FMS contract price did not include any direct or indirect costs for agent's fees not approved in writing by the purchasing country. By letter dated July 28, 1975, Northrop terminated the Agreement with Triad. In so doing, Northrop stated that the U.S. government had interpreted the letters and statements of the Saudi government as an absolute prohibition against agents' fees or commissions in FMS sales. Triad refused to agree to termination of the Agreement. Only after the Saudi government signed a Phase IIIE LOA containing a specific prohibition against the payment of fees or commissions, did Triad agree, on August 15, 1975, to terminate the Agreement as to Phase IIIE.

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[6]Phase IIIE was proposed by DOD as an extension of Phase III. A Phase IIIE LOA, signed by Saudi Arabia on August 14, 1975, contained a clause imposing a total ban on the payment of commissions in connection with the Phase IIIE project.

The Saudi Decree

On September 17, 1975, the Council of Ministers of Saudi Arabia issued Decree No. 1275 (the "Saudi Decree"), which provides, in part:

> *First*: No company under contract with the Saudi Arabian Government for the supply of arms or related equipment shall pay any amount as commission to any middleman, sales agent, representative, or broker irrespective of their nationality, and whether the contract was concluded directly between the Saudi Arabian Government and the company or through another state. Any commission arrangement already concluded by any of these companies with any other party shall be considered void and not binding for the Saudi Arabian Government;
>
> *Second*: If any of the foreign companies described in Article I (one) were found to have been under obligation for the payment of commission, payment of such commission shall be suspended after notifying the concerned companies of this decision. Relevant commissions shall be deducted from the total amount of the contract for the account of the Saudi Arabian Government.

Northrop sought no further services from, and made no payments to, Triad after September 17, 1975. The Saudi prohibition, as expressed in Decree No. 1275, was incorporated in a Phase V contract between DOD and Northrop, executed in March of 1976. No fees or commissions were included in any subsequent LOA signed by the Saudi government, and each LOA required Northrop to certify that the compensation paid to a marketing agent would not be claimed as an allowable item of cost and would not be included in the contract price.

The Arbitration Award

Pursuant to the arbitration provision of the Agreement, Triad filed its Demand for Arbitration on July 31, 1979, claiming commissions owed by Northrop. Northrop counterclaimed for Phase IV commissions advanced to Triad prior to DOD's refusal to allow such commissions. Northrop asserted as a defense to Triad's claims that the Saudi Decree bars any commission payments by Northrop to Triad and that any payment by Northrop to Triad might subject Northrop to prosecution under the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, enacted in 1977.

In its Decision as to Liability in the First Stage of Bifurcated Proceedings ("First Decision"), the tribunal found Northrop liable for commission payments on Peace Hawk Phases II, III and IV. In so holding, the tribunal rejected Northrop's contention that the Saudi Decree rendered payment of commissions illegal under California law.[7] The tribunal further held that payment of commissions agreed to and earned prior to 1977 would not subject Northrop to passible prosecution under the FCPA. However, the tribunal found that, under the allowability and recognition clause of the Agreement, Triad had assumed the risk that the U.S. government would not approve commission payments. Thus, Triad was not awarded commission payments which were not allowed by DOD. This included payments under Phase IIIE, V and thereafter. With respect to Phase IV, the tribunal found that Northrop had waived the Agreement's proviso and therefore was obligated to pay all commissions despite

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[7]The Agreement, ¶ 13, provides that "The validity and construction of this Agreement shall be governed by the laws of the State of California in the United States of America." The applicable law is discussed, *post.*

the absence of DOD approval. The tribunal denied Northrop's counterclaim for Phase IV advance commission payments.

In May 1983, the tribunal issued its Decision on Factual and Legal Issues Presented in Second Stage of this Proceeding ("Second Decision"), in which the amount of damages was assessed. During the course of second stage proceedings, Triad asserted additional claims for housing constructed by Northrop pursuant to a USAF — Northrop contract executed in September 1977 in Peace Hawk Phase V. Early in 1973, Northrop and Triad had executed Product Agreement No. 5,[8] which provided for commission payments on contracts for the construction of RSAF housing cantonments. The tribunal found that certain housing constructed during Peace Hawk Phase V constituted housing cantonments within the meaning of Product Agreement No. 5, and the Product Agreement No. 5 was not subject to the Agreement's recognition and allowability clause. Accordingly, the tribunal awarded Triad commissions earned on the Phase V housing construction contract.

Northrop seeks to vacate the tribunal's award on the ground that: (1) the legality and enforceability of the Agreement involve legal issues affecting "fundamental public interests" and, therefore, were not arbitrable; and (2) even if the legality and enforceability of the Agreement were arbitrable, the tribunal's decision was contrary to law and public policy and must be overturned.

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[8]This agreement became effective on January 1, 1973 and was to "cover and be applicable to the contract for cantonments for the Royal Saudi Air Force . . . to be constructed at Taif and Dhahran," regardless of whether such construction was designated as a part of the Peace Hawk Program or part of a separate U.S.-Saudi contract.

DISCUSSION

Arbitrability of the Dispute

[1] Both parties maintain that arbitrability of the Agreement is to be determined by reference to federal law. The United States Arbitration Act ("Arbitration Act"), 9 U.S.C. § 1 *et seq.*, "create[s] a body of federal substantive law" which governs the standards for enforcement of an arbitration award with respect to "a contract evidencing a transaction involving commerce." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983). *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 87 S.Ct. 1801, 1804, 18 L.ED.2d 1270 (1967); *Mediterranean Enter., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1463 (9th Cir.1983). However, the Court of Appeals for the Second Circuit recently held that the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 201 *et seq.*, was applicable to an arbitral award made in the United States, but involving two foreign entities. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir.1983).[9] At least one

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[9]The court in *Bergeson* stated:

> We adopt the view that awards "not considered as domestic" denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, *e.g.*, pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdictions.

710 F.2d at 932. Here, although Northrop is a California corporation having its principal place of business in Los Angeles, Triad Financial Establishment is a Liechtenstein establishment, and Triad International Marketing is a Liechtenstein corporation. Thus, it is possible that the subject arbitration is governed both by the Arbitration Act and by the Convention. *Id.* at 934.

court has held that questions concerning enforceability of arbitration agreements are governed by federal law, whether the action arises under the Arbitration Act, or the Convention. *Matter of Ferrara S.p.A.*, 441 F.Supp. 778, 780 n. 2 (S.D.N.Y.1977), *aff'd*, 580 F.2d 1044 (2d Cir.1978). As noted in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 2457 n. 15, 41 L.Ed2d 270 (1974):

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. [Citations omitted.]

Since both the Arbitration Act and the Convention reflect policy consideration favoring enforcement of agreements to arbitrate commercial disputes, *Scherk*, 417 U.S. at 510-11, 94 S.Ct. at 2452-53; *Matter of Ferrara*, 441 F.Supp. at 780 n. 2, the legality and enforceability of the subject arbitration award may be determined by reference to federal law.

Northrop asserts that the tribunal exceeded its authority by deciding legal issues affecting fundamental public interests, and that arbitration is an inappropriate forum in which to decide statutory or public policy. Specifically, Northrop challenges the tribunal's authority to construe United States policy as announced by DOD in statements and publications, and as codified by Congress in the

FCPA; and Saudi policy as promulgated in the Saudi Decree.[10]

[2] The Arbitration Act was "designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts . . . .' " *Scherk,* 417 U.S. at 510-11, 94 S.Ct. at 2453. Thus, § 2 of the Act, 9 U.S.C. § 2, provides that arbitration agreements subject to its provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[3] However, the arbitrator's central role is to "effectuate the intent of the parties rather than the requirements of enacted legislation." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 56-57, 94 S.Ct. 1011, 1024, 39 L.Ed.2d 147 (1974). Thus, in *Wilko v. Swan,* 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), the Court declined to apply the Act's provisions where enforcement of an arbitration agreement would deprive a defrauded purchaser of a remedy under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2). *Wilco* has been followed in a number of other areas where public policy is implicated. *See, e.g., Allegaert v. Perot,* 548 F.2d. 432 (2d Cir.), *cert. denied,* 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1084 (1977) (arbitration agreement unenforceable against trustee in bankruptcy alleging violation of the Bankruptcy Act); *American Safety Equip. Corp. v. J.P. Maguire & Co.,* 391 F.2d 821 (2d Cir. 1968) (courts, not arbitration proceed-

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[10]Both the Arbitration Act and the Convention permit a reviewing body to refuse recognition or enforcement of an arbitral award which is contrary to public policy. *See Scherk,* 417 U.S. at 519 n. 14, 94 S.Ct. at 2457 n. 14. In applying the "contrary to public policy" standard I do not reach the issue whether the Northrop-Triad dispute is governed by the Arbitration Act or by the Convention.

ings, are the proper forum for resolutions of anti-trust claims); *Alexander v. Gardner-Denver Co.*, 415 U.S. at 56, 94 S.Ct. at 1023 (arbitration is an inappropriate forum for the resolution of rights created by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.)*.

[4] The court in *Scherk* carved out an exception to *Wilko* in a contract dispute between an American manufacturer and a German citizen whose companies were organized under the laws of Germany and Lichtenstein. The parties agreed to arbitrate disputes arising out of the contract in proceedings to take place in Paris, and to be governed by Illinois law. Respondent sought relief in federal court under § 10(b) of the Securities Exchange Act of 1934, U.S.C. § 78j(b), for alleged fraudulent representations concerning the status of trademark rights. The Court distinguished *Wilko* on the ground that the contract in question was a "truly international agreement" in which potential international conflict of laws problems might arise.[11]

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[11]With respect to the international nature of the agreement, the Court in *Scherk* noted:

> The negotiations leading to the signing of the contract took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets.

417 U.S. at 515, 94 S.Ct. at 2455. Here, the parties are organized under the laws of the United States and Liechtenstein, respectively, Triad's president, Adnan Kashoggi, is a citizen of Saudi Arabia. Negotiations on various phases of the Peace Hawk Program took place in the United States, while the contract was performed largely

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.

417 U.S. at 515-16, 94 S.Ct. at 2455. Here, as in *Scherk*, the parties are involved in a "truly international agreement" to which the applicability of a particular country's law or public policy is uncertain. Enforcement of the Agreement's arbitration clause effectively promotes the orderly resolution of the parties' contractual dispute. The *Wilko* exception to the Arbitration Act, therefore, is inapplicable.[12]

Standard of Judicial Review

It must next be determined whether the dispute, though properly submitted to arbitration, was resolved in accordance with law. The parties initially dispute the applicable standard by which the tribunal's decision is to be reviewed.

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in Saudi Arabia, and payments under the Agreement were made in both the Unites States and Switzerland.

[12]Triad also asserts that Northrop waived its right to challenge the jurisdiction of the tribunal by voluntarily submitting the dispute to arbitration. *See George Day Constr. Co. v. United Bhd. of Carpenters*, 722 F.2d 1471, 1746 (9th Cir. 1984). Northrop denies this assertion. Because I conclude that the dispute was arbitrable, I do not decide whether Northrop waived its right to an independent judicial determination on the issue of arbitrability.

Triad maintains that the Court must defer to any decision which "draws its essence" from the marketing agreement, *USW v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960), "notwithstanding the erroneousness of any factual findings or legal conclusions, absent a manifest disregard of the law." *George Day Constr. Co.*, 722 F.2d at 1477. However, it has repeatedly been recognized that a court may not enforce an award which is contrary to law and public policy. *See W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983); *George Day Constr. Co.*, 722 F.2d at 1477; *Broadway Cab Coop., Inc. v. Teamster & Chauffeurs Local Union 281*, 710 F.2d 1379 (9th Cir.1983).

[5] In determining whether an arbitrator's award is contrary to law and public policy, the court is not constrained by the traditional deferential standard set forth in *Enterprise Wheel*. In *Broadway Cab*, the Ninth Circuit held that deference is unwarranted where an arbitrator's decision is challenged as violative of Supreme Court precedent. 710 F.2d at 1383. Judicial deference is similarly unwarranted where, as here, the public policy in question involves DOD regulations,[13] a foreign govern-

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[13]Triad maintains that the Saudi Decree had no counterpart in federal law or U.S. public policy. However, it is clear that DOD wished to conform its policy precisely to that announced by Saudi Arabia. For example, a DOD proposed amendment to the Peace Hawk Phase IIIE Letter of Offer would have required Saudi approval even of agent's fees paid by Northrop but *not* charged to the Saudi government. (No such fees were approved.) Communications between Northrop and DOD subsequent to Prince Sultan's initial rejection of agents' fees in U.S.-Saudi arms contracts all indicated that agents' fees would "not be allowed" in additional Peace Hawk Phases. DOD's revised Defense Procurement Circular, issued July 9, 1975, provided that suppliers acting under contract to DOD would hence-

ment's decree, and a federal statute (the FCPA). Thus, I examine *de novo* the arbitrator's decision with respect to the alleged unenforceability of the Agreement on public policy grounds.[14]

Illegality Under Local Law

In reaching its decision, the tribunal considered and rejected Northrop's contention that enforcement of the Agreement was illegal under California law. Cal.Civ.Code § 1511 provides that performance of an obligation is excused "[w]hen such performance . . . is prevented . . . by the operation of law . . ." Northrop asserts that the Saudi Decree prevented performance of the Agreement within the meaning of § 1511, and that payment of commissions claimed by Triad therefore is excused. The tribunal relied primarily upon two cases decided under

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forth be required to certify that their FMS contract price did not contain any costs for agent's fees not approved in writing by the purchasing country (including Saudi Arabia). DOD actions taken with respect to suppliers in arms sale contracts clearly reflected a policy of adherence to the prohibitions of the Saudi Decree.

The Fifth Circuit held, in a breach of contract action governed by California law, that the government's informal priorities policy ("jawboning") came within the excusable delay provision of a lease agreement. *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir.1976). Concluding that a voluntarily acquiesced-in policy could constitute an "act of government, governmental priority, allocation regulation or order" within the meaning of the contract's excusable delay clause, the court held that the jawboning issue should have been submitted to the jury. DOD's enforcement of Saudi policy was coercive rather than voluntary, and is properly characterized as U.S. public policy.

[14]Since a court ordinarily must defer to an arbitrator's legal as well as factual conclusions, it should be stressed that the court undertakes *de novo* review only of that portion of the tribunal's decision which is alleged to be contrary to law and public policy.

California law in which governmental action of a foreign state prevented performance of a contract. Appellant in *Baird v. Wendt Enter., Inc.,* 248 Cal.App.2d 52, 55, 56 Cal.Rptr. 118 (1967) was not entitled to damages for breach of a contract whose performance had been "made impossible by operation of law . . ." Respondent's performance was excused, within the meaning of § 1511, by the State of Hawaii's refusal to furnish a building permit under a building code enacted after execution of the contract. In *Johnson v. Atkins,* 53 Cal.App.2d 430, 127 P.2d 1027 (1942), the buyer was excused from performance of a contract to purchase copra for shipment to Columbia when, after execution of the contract, Columbia banned further importation of copra. The tribunal read *Baird* and *Johnson* to require *factual* impossibility in order to fall within the "prevention by operation of law" standard.

> In neither [*Baird* nor *Johnson*] did the California court undertake an examination of the law and decisions of the other state or country to determine how it would decide the question presented. Instead, the court simply looked at whether on the face of things the governmental action had in fact prevented performance of the contract in question.

First Decision at 24. Applying a factual impossibility standard to the facts at hand, the tribunal found "no comparable governmental action."

> It may be that promulgation of Decree 1275 created problems for Northrop and Triad in that they possibly would have some difficulties with the government of Saudi Arabia as a result of not complying with Decree 1275. However, that decree did not make performance of the Marketing Agreement impossible. It still was perfectly possible for Northrop to make

> payments of compensation to Triad pursuant to the contract [sic]. It also would have been possible for Triad to give advice to Northrop, . . . and to do the other services called for by the Marketing Agreement. We cannot look at Decree 1275 and on its face find resulting impossibility of performance as the California courts did in *[Baird]* and *Johnson.* The decree did not produce impossibility of performance under § 1511.

Id.

[6] The tribunal's interpretation of California law is untenable. Performance prevented by the "operation of law" within the meaning of § 1511 need not be factually impossible. Neither *Baird* nor *Johnson* supports such a conclusion. California law does not require a party to violate the law of a foreign jurisdiction in order to avoid liability for breach of contract. *Industrial Dev. & Land Co. v. Goldschmidt,* 56 Cal. App. 507, 206 P. 134 (1922), is illustrative. Plaintiff in *Goldschmidt* leased certain property to defendants for the purposes of running a liquor business. When, prior to expiration of the lease, the Prohibition Amendment was adopted, the lessees were excused from any further obligations under the lease since the business for which the land had been leased had become unlawful. Peformance of the contract became illegal.

> [A] contract which contemplates the doing of a thing which is unlawful at the time of the making thereof is void. For the same reason a contract which contemplates the doing of a thing, at first lawful but which afterward and during the running of the contract term becomes unlawful, is affected in the same way and ceases to be operative upon the taking effect of a prohibitory law.

Id. at 509, 206 P. 134. The "operation of law" defense set forth in § 1511 is equally applicable to a foreign law. *See Baird, Johnson, supra.* It therefore must be determined whether the effect of the Saudi Decree was to prevent performance of the Agreement within the meaning of § 1511.

Illegality Under Saudi Law

Triad asserts that Saudi law does not preclude payment of commissions owed it by Northrop. This assertion is premised upon an interpretation of the Saudi Decree which would (1) permit the payment of commissions which are not charged to the Saudi government; and (2) exempt "full service" agents such as Triad from the Decree's prohibition.

Beginning in March 1975, DOD sought approval from the Saudi government for agent's fees included in certain phases of the Peace Hawk Program. In response to each DOD inquiry, Prince Sultan indicated that the proposed commissions would not be accepted by Saudi Arabia. Triad relies on the wording of Saudi-DOD communications, and on conversations which took place in June 1975, between Prince Sultan and Northrop and Triad officials, to support its claim that the Saudi government rejected *only* those commissions charged to the Saudi government, and not fees paid by Northrop which were not passed on to Saudi Arabia through an LOA. [15] However, the wording

[15]In June 1975, Thomas C. Barger, a member of the Executive Committee of Northrop's Board of Directors, met with Prince Sultan in Saudi Arabia. At the arbitration proceedings Barger testified that Prince Sultan stated that "he had nothing against agents as such . . ." but that "if the company wanted to have agents, it should pay for them itself and not charge the government." R.T. x:1628-1629. Kashoggi similarly stated in deposition testimony that Prince Sultan

of both inter-governmental communications and the Saudi Decree clearly extends the Saudi prohibition beyond mere inclusion of commissions in the Saudi contract price. In letters dated May 17 and June 10, 1975, Prince Sultan stated unequivocally that the Saudi government disapproved not only the payment of commissions by suppliers to agents, but also the use of any middlemen in U.S. — Saudi Arabia arms contracts."[16]

The Saudi Decree similarly prohibits any commission arrangement between arms suppliers and "any middleman, sales agent, representative, or broker . . . ." The Decree also provides that existing obligations for the payment of commissions "shall be suspended," and that

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informed him, at a meeting on June 10, 1975, that so long as commissions were not charged to Saudi Arabia, "[i]t was not his business to interfere in commercial contracts between Saudi Companies and Foreign Companies." Kashoggi Depo. 13, 15.

[16]In response to DOD's inquiry concerning Phase V commissions, Prince Sultan stated:

> "[A]s soon as I received your letter I informed the American Ambassador to the Kingdom and the Chief of the American Military Mission of my utter rejection of [the proposed $45 million] commission *and my complete nonacceptance of any middleman, no matter who or from where he happens to be, in any arms contract between the Kingdom of Saudi Arabia and the Government of the United States of America.*" (Emphasis added.)

With respect to Phase IV commissions, Prince Sultan wrote:

> "We would like to inform you that the Saudi Arabian Government does not approve of such payments and absolutely will not permit them. Further, I would like to remind you of what was contained in my letter to [Assistant Secretary of Defense] Ellsworth dated May 17, 1975, concerning the *non-acceptance of any intermediary regardless of his nationality or regardless of which party he represents for any arms contract between the Saudi Arabian Government and the United States Government.*" (Emphasis added.)

"Relevant commissions shall be deducted from the total amount of the contract for the account of the Saudi Arabian Government." While the Decree clearly reflects the Saudi government's unwillingness to be charged for commissions paid to middlemen, that is not its sole intent or effect. The Decree also contains a broad prohibition against "go-betweens or commissions of any kind on arms contracts . . . ."[17] The words "No company . . . shall pay," cannot fairly be construed to preclude only those commissions charged to the Saudi government; rather, the Decree imposes a flat ban upon commission agreements between suppliers and agents in U.S.—Saudi arms contracts.

Triad next asserts that it is not an "intermediary, sales agent, representative or broker" within the meaning of the Saudi Decree, but instead performs a broad range of services not typically provided by a middleman or marketing representative.[18] As such, Triad claims to be exempt from the prohibition of the Saudi Decree.

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[17]The preamble to the Saudi Decree provides, in part:

> "The Council of Ministers, . . . in confirmation of Saudi regulations banning intermediaries in contracts and any illegitimate payments, and in line with the government's policy that there will be no go-betweens or commissions of any kind on arms contracts, . . . Decides as follows . . . ."

[18]Triad's expert witness, Samir Shamma, testified at the arbitration proceedings that the broad range of services performed by Traid renders it a "service agent," a category of business enterprise not included in any of the Arabic words which are translated as "intermediary, sales agent, representative, or broker," within the meaning of the Saudi Decree.

The services performed by Triad, which are not typically performed by an intermediary, sales agent, representative or broker include: (1) providing the client with information concerning the kind of projects

This interpretation is inconsistent with the circumstances surrounding adoption of the Decree, and with the plain language of the Decree itself. Prince Sultan initially addressed the issue of agent's fees on May 17, 1975, in response to a DOD inquiry concerning the inclusion of Triad commissions in a Phase V Letter of Offer. On June 10 Prince Sultan expressed his disapproval of "such [commission] payments" and "non-acceptance of any intermediary," in response to a DOD inquiry concerning the inclusion of Triad commissions in a Phase IV LOA. Shortly thereafter, on June 14, 1975, MODA issued a public proclamation reiterating its rejection of intermediaries in arms contracts, and referring explicity to Northrop's agency relationship with Triad.[19] The June 14 proclamation is cited in the preamble to the Saudi Decree,

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within Saudi Arabia which are within a client's field of products and services; (2) working with a client to establish a marketing strategy for an available product; (3) assisting the client in preparing a proposal or bid; (4) assisting in communication between the client and Foreign Ministry personnel; and (5) assisting the client, once a contract is awarded, in obtaining logistic support within the foreign country, letters of credit and work visas for the client's personnel.

It was Shamma's testimony that the Saudi Decree was aimed at an entirely different category of business enterprise, whose functions do not encompass any of the great variety of services provided by Triad.

[19]The MODA proclamation provided, in part:

> "On the occasion of recent news agency reports about the payments by the American Northrop Corporation to its agent, the Triad Financial Corporation, ... the Ministry of Defense and Aviation wishes to make clear [that] ... [t]he Government has been making sure that there should be no intermediaries or beneficiaries of these arms contracts. If some companies have been paying commissions to agents in return for real or imaginary services, the Government of Saudi Arabia is unaware of such payoffs, did not approve of them and will not tolerate them."

which makes reference both to official statements and MODA's letters to DOD "disapproving brokerage and payment of commissions on arms contracts . . . ."

It is clear that the Saudi Decree reflects a governmental policy formulated specifically with the Northrop-Triad agency relationship in mind. It stretches credibility beyond the breaking point to conclude, in this context, that the Decree was worded so as to exempt "service agents" such as Triad from its prohibitions.[20]

Finally, Triad asserts that the Agreement is valid under the "general law" of Saudi Arabia, which binds Northrop and Triad to carry out their contract in good faith.[21] Triad additionally maintains that even if the Decree were construed to apply to some or all of Triad's claims, a Saudi court would nevertheless enforce the Agreement, leaving it to other Saudi authorities to deal with the consequences of a violation of the Decree.

These assertions are controverted by Northrop's expert witnesses.[22] Moreover, even if Saudi general law were as

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[20]Northrop's expert witness, Fathi Hussein, testified at the arbitration proceedings that Triad was an "intermediary, sales agent, representative or broker" within the meaning of the Decree, noting that the Agreement specifically refers to Traid as Northrop's "representative," and provides that Triad's compensation is to be in the form of commissions. R.T. x:1472, 1516-17, 1520, 1558-60.

[21]Shamma testified that the principle of "ibaha" or freedom of contract is a basic tenet of "Shari'a" (Islamic) law, and requires that parties fulfill their contractual obligations even though such obligations violate a Council of Ministers' decree.

[22]Hussein testified that Shari'a law provides that the Ruler may issue rules and regulations to regulate the life of the changing society, and that nothing in Shari'a law prevents the issuance of laws proscribing certain conduct or transactions, even if such laws limit the principle of "ibaha" or freedom of contract. Hussein also testified that the contractual dispute between Northrop and Triad would be

contended by Triad, California law would not permit the result urged by Triad to obtain. As noted, Cal. Civ.Code § 1511 excuses performance which is prevented by operation of law. Application of § 1511 cannot logically be limited to those situations in which performance is prevented by court order.

[7] There is ample evidence from which to conclude that the Saudi Decree prevented performance of Phases IIIE, IV and V of the Agreement within the meaning of § 1511[23] Therefore, that portion of the tribunal's award

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heard in the Saudi Board of Settlement of Commercial Disputes, a commercial court set up to enforce laws and regulations enacted by the King or by the Council of Ministers, and that the Board of Settlement would in all likelihood enforce the prohibitions of the Decree. R.T. x:1466-67, 1490, 1568. Zaki Mustafa, another expert witness for Northrop who is a law partner of Hussein, stated in his affidavit that the Decree would be considered by any Saudi court to be a complete defense to any commissions claimed under the Agreement.

[23]Northrop argues, in the alternative, that even if California law does not prohibit payment of commissions claimed by Triad, the parties contractual choice of law will not be enforced where:

> application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflicts, § 187(2)(b). California has adopted the Restatement rule. *See Ashland Chem. Co. v. Provence*, 129 Cal.App.3d 790, 794, 181 Cal.Rptr. 340 (1982); *S.A. Empresa De Viacao Aerea Rio Grandense V. Boeing Co.*, 641 F.2d 746, 749-50 (9th Cir.1981), *rev'd on other grounds*, — U.S. —, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). Although it need not be determined here whether the Restatement rule requires application of Saudi law, the evidence supports the conclusion that enforcement of Triad's claims would violate a fundamental policy of Saudi Arabia and that Saudi

based upon claims which are violative of the Saudi Decree must be vacated. The Saudi Decree, however, did not prevent performance with respect to the $6 million advance commission payment under Phase IV. This payment was made well before the Saudi Decree was promulgated. Although the record before the tribunal indicates that virtually no Phase IV commissions were earned until after September 1975, the Decree, on its face, does not require reimbursement of commissions already paid. Under these circumstances, the Court declines to disturb the tribunal's award, denying recovery on Northrop's counterclaim.

The Foreign Corrupt Practices Act

[8] Northrop additionally asserts that the FCPA prohibits enforcement of the tribunal's award. The FCPA was enacted in 1977 in response to reports by the Securities and Exchange Commission ("SEC") concerning widespread corporate bribery of foreign officials.[24] In general terms, the FCPA criminalizes foreign corporate bribery. *See* 15 U.S.C. § 78dd-1(a). It was Northrop's contention at the arbitration proceedings that, prior to

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Arabia has a materially greater interest in determining whether enforcement of Triad's claims would contravene the express prohibitions of the Saudi Decree.

[24]The Senate Committee, in support of the criminalization of foreign corporate bribery, noted:

> "The serious abuses which the [SEC] has uncovered justify an explicit congressional affirmation of our national commitment of ending corrupt foreign payments. While the [SEC] has made substantial progress in its enforcement program, the committee believes that legislation is appropriate to make clear that cessation of these abuses is a matter not merely of SEC concern, but of national policy."

S.Rep. No. 114, 95th Cong., 1st Sess. 3, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4098, 4101 and 4107.

enactment of the FCPA, Triad promised to bribe and bribed Saudi officials for the purpose of influencing their decisions concerning the Peace Hawk Program and to obtain business for Northrop. Northrop maintained that a pre-FCPA promise made to a foreign official to secure an award of a contract at that time would constitute a violation of the FCPA. First Decision at 13.

The tribunal concluded that the FCPA did not apply to a promise or offer of payment made prior to the statute's enactment:

> For the statute to apply the payment must be made after the law became effective to a person who at the time is a foreign official and it must be made to induce that official to use his influence with the foreign government to cause it then to award a contract to the payor or to persuade the government to permit payor to retain business with it which it then has.[25]

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[25]The tribunal found evidence that in 1971 and 1972 Triad promised to distribute bribes to General Hashim, then head of the RSAF, and to Hashim's successor, General Zuhair, in order to further the award of a Phase III contract to Northrop. Northrop advanced $450,000 to Triad for this purpose, $250,000 of which was paid to General Hashim. First Decision at 15-16.

In addition to rejecting the position that the FCPA applies retroactively to pre-FCPA conduct, the tribunal noted:

> As a matter of fact, the evidence shows that Triad received money for [payments to foreign officials] in advance of any disbursements, if such were made. Thus there was nothing to reimburse on the basis of the record before us.

First Decision at 13. The tribunal considered whether a payment pursuant to an earlier, *continuing* promise might subject Northrop to possible prosecution, but found no evidence in the record to support a finding that a present payment by Northrop to Triad on the claims asserted would be used presently to influence the award or retention of business in violation of the FCPA. First Decision at 15.

First Decision at 15. I similarly conclude that the prohibitions of the FCPA are prospective only. Nothing in the wording of the statute or its legislative history suggests that Congress intended the FCPA to be applied retroactively. Even were such intent present, the criminalization of pre-FCPA conduct would face serious constitutional barriers.

[9] The Constitution's Ex Post Facto Clause, Art. 1, § 9, cl. 3, forbids the retroactive application of a statute to penalize conduct which was innocent when done. *See Marks v. United States,* 430 U.S. 188, 191, 97 S.Ct. 990, 992, 51 L.Ed.2d 260 (1977); *United States v. Campanale,* 518 F.2d 352, 364-65 (9th Cir. 1975), *cert. denied,* 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638 (1976). Similarly, "Due process requires that a person be given fair notice as to what constitutes illegal conduct so that he may conform his conduct to the requirements of the law." *United States v. Dahlstrom,* 713 F.2d 1423, 1427 (9th Cir.1983), *cert. denied,* — U.S. —, 104 S.Ct. 2363, 80 L.Ed.2d 835 (1984). *See also, Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); *United States v. Goodheim,* 651 F.2d 1294 (9th Cir.1981).

[10] The record contains no evidence that Northrop engaged in conduct which was illegal under United States law prior to enactment of the FCPA. Because enforcement of claims based upon pre-1977 promises or payments by Triad to Saudi officials would not expose Northrop to possible prosecution under the FCPA,[26] the

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[26]Northrop relies upon *SEC v. Katy Indus. Inc.,* No. 78C-3476 (N.D.Ill. Aug. 30, 1978), in which the SEC obtained a consent decree enjoining Katy Industries from violating the FCPA. Katy Industries was alleged to have entered into an agreement in 1975 to make payments to a consultant based on a percentage of its net profits under a 30-year contract, knowing or with reason to know that the

FPCA does not prohibit enforcement of the tribunal's award.

CONCLUSION

The tribunal issued its award in favor of Triad on claims arising in Phases II, III, IV, and Product Agreement No. 5 of Phase V of the Peace Hawk Program. Phase II and Phase III commissions clearly were "earned" prior to enactment of the Saudi Decree. With respect to Phase II and Phase III, performance of the

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payments would be shared with a high-level government official. Even assuming, contrary to the evidence as found by the tribunal, that Triad made a similar continuing promise to Saudi officials, *Katy Industries* does not have precedential value for the purposes of applying the FCPA to the Northrop-Triad Agreement. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37, 95 S.Ct. 926, 934, 43 L.Ed.2d 149 (1975) (consent decrees should be construed "basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation").

In addition, in an action instituted by the SEC prior to 1977, the District Court for the District of Columbia, entered a Final Judgment of Permanent Injunction, prohibiting Northrop from "using or aiding and abetting the use of corporate funds of Northrop Corporation or any of its affiliates or subsidiaries for unlawful political contributions or other similar unlawful purposes." In 1977, after the FCPA was enacted, Northrop petitioned that court to modify the terms of its injunction to provide for judicial review of any arbitration award issued against Northrop pursuant to the Agreement, to determine whether payment of Triad's claims would violate the injunction. By order dated February 29, 1980, the court refused to so modify its injunction, but stated that, under the terms of the injunction, Northrop was specifically "barred from violating the Foreign Corrupt Practices Act of 1977." Because I conclude that the FCPA is not retroactive, enforcement of that portion of the tribunal's award based upon pre-FCPA transactions has no bearing on Northrop's compliance with the terms of the above injunction.

Agreement was completed before September 1975, except for Northrop's final commission payment, due on November 10, 1975. Any outstanding payments due under Phase II or Phase III, therefore, are unaffected by the Saudi Decree. The tribunal's award with respect to Triad's Phase II and Phase III claim is confirmed, as is its award denying recovery on Northrop's counterclaim for Phase IV advance commissions.

The Saudi Decree prohibits payment of commissions due under Phase IIIE, Phase IV and Phase V. The tribunal's award with respect to Triad's Phase IV and Phase V claims is vacated.

APPENDIX B-1

NORTHROP CORPORATION,
Petitioner-Respondent/Appellee,

v.

TRIAD INTERNATIONAL MARKETING S.A.,
and Triad Financial Establishment,
Respondent-Petitioner/Appellant.

No. 84-6480.
United States Court of Appeals,
Ninth Circuit.

Argued Oct. 8, 1985.
Submitted May 5, 1986.
Decided March 3, 1987.

As Amended May 27, 1987.

Appeal from the United States District Court for the Central District of California.

Before BROWNING, Chief Judge,
KENNEDY and HUG, Circuit Judges.

OPINION

JAMES R. BROWNING, Chief Judge:

In October, 1970 Northrop and Triad entered into a "Marketing Agreement," under which Triad became Northrop's exclusive marketing representative to solicit contracts for aircraft and related maintenance, training, and support services for the Saudi Air Force, in return for commissions on sales. Northrop made substantial sales to Saudi Arabia and paid Triad a substantial part of the commissions due under the Marketing Agreement.

On September 17, 1975, the Council of Ministers of Saudi Arabia issued Decree No. 1275, prohibiting the payment of commissions in connection with armaments

contracts.[1] Northrop ceased paying commissions to Triad. Triad protested, and demanded payment of the commissions remaining due under the Agreement. The dispute was submitted to arbitration. The arbitrators sustained Triad's claim in part, denied it in part, and entered an award in Triad's favor.

Triad filed an action to confirm the arbitrators' award, and Northrop filed suit to vacate it. The district court vacated the award in some respects. 593 F.Supp. 928, 942 (C.D.Cal.1984). Triad appealed.[2] We reverse.

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[1] That Decree provides in relevant part:

> *First:* No company under contract with the Saudi Arabian government for the supply of arms or related equipment shall pay any amount as commission to any middleman, sales agent, representative or broker irrespective of their nationality, and whether the contract was concluded directly between the Saudi Arabian government and the company or through another state. Any commission arrangement already concluded by any of these companies with any other party shall be considered void and not binding for the Saudi Arabian government;
>
> *Second:* If any of the foreign companies described in Article I (one) were found to have been under obligation for the payment of commission, payment of such commission shall be suspended after notifying the concerned companies of this decision. Relevant commissions shall be deducted from the total amount of the contract for the account of the Saudi Arabian government.

[2] Northrop did not appeal the district court's holding that the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, did not apply retroactively to Triad's pre-Act conduct. 593 F.Supp. at 940-41. Nor did Northrop appeal the district court's holding that the dispute was arbitrable. *Id.* at 934-36.

I

The arbitrators noted that the essence of Northrop's defense was that Saudi Arabia's Decree No. 1275 applied to the Marketing Agreement, and made illegal any commission payment to Triad under the Agreement. "This contention," the arbitrators said, "necessitates a consideration of the meaning and effect of paragraph 13 of the Marketing Agreement." First Arbitrators' Decision at 19.

Paragraph 13 of the Marketing Agreement provided: "[T]he validity and construction of this Agreement shall be governed by the laws of the State of California." It further provided: "Any controversy or claim between the parties hereto arising out of or in connection with this Agreement . . . shall be settled by arbitration," and "[t]he award of a majority of the arbitrators . . . shall be final and binding upon the parties."[3]

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[3]Paragraph 13 of the Marketing Agreement states in full:

> The validity and construction of this Agreement shall be governed by the laws of the State of California in the United States of America. Triad agrees not to institute any litigation or proceedings against Northrop outside the continental United States. Any controversy or claim between the parties hereto arising out of or in connection with this Agreement which might be the subject of any action at law or suit in equity shall be settled by arbitration in the City of Los Angeles, State of California, in the United States of America, under the rules then obtaining of the American Arbitration Association. The award of a majority of the arbitrators, including the apportionment of the expenses of the arbitration, shall be final and binding upon the parties, and judgment upon the award rendered may be entered in any court having jurisdiction.

The arbitrators noted that Northrop had proposed inclusion of paragraph 13 in the Marketing Agreement to make it

> unnecessary for Northrop to make an in-depth study of the law of countries such as Saudi Arabia, Iran, etc., to know what its rights and obligations would be. Instead of having varying and even inconsistent results under the same contractual provisions as a result of applying different laws, depending on where the marketing was to occur, this clause resulted in uniformity of interpretation and application of the contract. Northrop was familiar with the law of California and knew what to expect from it.

Id. at 19-20. Accordingly, the arbitrators interpreted paragraph 13 as requiring that the local law of California determine the effect of Saudi Arabia Decree No. 1275 on Northrop's obligation to pay commissions to Triad pursuant to the Marketing Agreement.[4] Northrop does not disagree with this determination.

Northrop argued the Marketing Agreement was invalid under California Civil Code § 1511. This statute provides "performance of an obligation . . . is excused . . . [w]hen such performance . . . is prevented . . . by the operation of law. . . ."

Cal.Civ.Code § 1511(1). Northrop reasoned Saudi Decree No. 1275 rendered the Marketing Agreement unlaw-

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[4] The arbitrators noted that if paragraph 13's choice of California law were to be read as including California's conflict-of-law rules, the effect would be to inject "the laws of various other countries into the resolution of these disputes, thereby causing the uncertainty and lack of uniformity which the parties sought to avoid." First Arbitrators' Opinion at 21. *See* Restatement (Second) of Conflict of Laws, §§ 186 comment b, 187(3) & comment h.

ful under California Civil Code § 1511 because the Decree "prevented" payment of commissions to Triad and thus "excused" Northrop's performance to its obligations under the Agreement.

The arbitrators pointed out that the decisions interpreting California Civil Code § 1511 principally relied upon by Northrop, including *Baird v. Wendt Enterprises, Inc.,* 248 Cal.App.2d 52, 56 Cal.Rptr. 118 (1967), and *Johnson v. Atkins,* 53 Cal.App.2d 430, 127 P.2d 1027 (1942), did not look to the law of the foreign jurisdiction to determine whether performance of the contract was unlawful, but instead examined the legal action the foreign jurisdiction had taken to determine whether in fact it prevented performance of the contract. In *Baird,* the court concluded that a foreign jurisdiction's adoption of a building code precluding issuance of a permit to construct a building "prevented" performance of the contract within the meaning of section 1511. In *Atkins,* the court held a foreign jurisdiction's cancellation of entry permits for copra "prevented" performance of a contract to sell copra for delivery in the foreign jurisdiction.

The arbitrators concluded there "was no comparable governmental action in this case." The building in *Baird* could not be built without a building permit; the copra in *Atkins* could not be delivered without an entry permit; but in this case despite the issuance of Decree No. 1275, Northrop could still pay Triad the commissions the Marketing Agreement called for, and Triad could still give advice, translate documents, make local arrangements, and perform the other services the Agreement required. Moreover, as Triad points out, before Decree No. 1275 issued, Triad had successfully solicited the sales contracts Northrop sought and thus had already completed performance of its principal obligation under the Marketing Agreement.

Northrop argued that to honor its obligations to Triad, Northrop would be required to violate Decree No. 1275. The arbitrators adopted Judge Hamley's statement for this court in a similar case and responded: "it may be that Boeing has gotten itself into some trouble with the government of Kuwait by setting up and terminating a selling agency in a manner allegedly violative of Kuwait law. But as between Boeing and Alghanim, we think the contract provision must govern." *Alghanim v. Boeing Co.*, 477 F.2d 143, 150 (9th Cir. 1973).

II

[1] The district court reviewed the arbitrators' decision *de novo,* rather than under a deferential standard, on the ground that the question presented was whether the Agreement was "contrary to law and public policy," 593 F.Supp. at 936. We consider later whether the arbitrators' interpretation and application of the Agreement is unenforceable because it is contrary to public policy. As the district court correctly stated, this was a question for the court alone to decide. *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers,* 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983); *American Postal Workers v. United States Postal Serv.*, 682 F.2d 1280, 1286 (9th Cir.1982).

[2] The question the arbitrators decided, however, was one of contract interpretation. That issue was the proper interpretation of the requirement of paragraph 13 of the Marketing Agreement that claims arising in connection with the Agreement be settled by arbitration and that California law be applied in resolving them. More specifically, the question was whether paragraph 13 required the arbitrators to apply California Civil Code § 1511 to determine the effect of Saudi Arabia Decree No. 1275 on the

obligations of the parties under the Agreement, and, if so, what that determination should be. This issue arose from the very terms of the Marketing Agreement. Its resolution was an inescapable part of the arbitrators' task of interpreting and applying the Agreement and resolving the dispute between these parties. Courts are bound to enforce an award based upon the arbitrators' resolution of such an issue "even in the face of 'erroneous findings of fact or misinterpretations of law.'" *French v. Merrill Lynch, Pierce, Fenner & Smith,* 784 F.2d 902, 906 (9th Cir. 1986) (quoting *American Postal Workers,* 682 F.2d at 1285) (footnote omitted).

This case is not unlike *George Day Construction Co. v. United Brotherhood of Carpenters,* 722 F.2d 1471 (9th Cir. 1984). A clause in the contract in *George Day Construction* provided that the terms of the contract were intended to be consistent with federal and state law. The arbitrators interpreted this contract provision as authorizing the abitrators to look to external law to resolve the parties' dispute. In reviewing the award, the court held that both the arbitrators' interpretation of this provision and their resolution of the legal questions the dispute raised as to the parties' contractual obligations were entitled to deferential review. *Id.* at 1479-80. *See also International Bhd. of Teamsters v. Washington Employers, Inc.,* 557 F.2d 1345, 1349-50 (9th Cir. 1977).

Similarly, in this case it was within the arbitrators' authority to interpret paragraph 13 as requiring that all disputes under the Agreement be determined by the arbitrators in accordance with California law. This interpretation required the arbitrators to decide questions of California law relevant to the parties' dispute as to their obligations under the Agreement. "In such circumstances, the arbitrator may and indeed must do so to fulfill his

function under the agreement, and a court should not review the merits of his performance in any more depth than it reviews the merits of his interpretation of other contractual provisions." Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review,* 80 Colum.L.Rev. 267, 286 (1980).[5]

[3] The arbitrators' conclusions on legal issues are entitled to deference here. The legal issues were fully briefed and argued to the arbitrators; the arbitrators carefully considered and decided them in a lengthy written opinion. To now subject these decisions to *de novo* review would destroy the finality for which the parties contracted and render the exhaustive arbitration process merely a prelude to the judicial litigation which the parties sought to avoid.[6]

III

In stating the rule of deferential review afforded arbitration awards, the Supreme Court also noted a limita-

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[5]In *W.R. Grace,* the Supreme Court stated that because "[i]mpossibility is a doctrine of contract interpretation," the arbitrators' implicit rejection of that defense was not subject to *de novo* review. *W.R. Grace,* 461 U.S. at 767-68 n. 10, 103 S.Ct. at 2184 n. 10. The Supreme Court's observation would appear applicable to the defense made available by California Civil Code § 1511.

[6]Courts asked to enforce arbitrators' agreements have reviewed some legal issues *de novo. See, e.g., American Postal Workers v. United States Postal Serv.,* 682 F.2d at 1285; *Broadway Cab Coop. v. Teamsters & Chauffeur Local,* 710 F.2d 1379, 1383 (9th Cir.1983). Questions falling in this category are not clearly defined. What is clear is that legal questions resolved in an award that "draws its essence from the collective bargaining agreement," as did the award in this case, are for the arbitrators to decide and those decisions are entitled to deferential review. *United Steelworkers, v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960).

tion: "the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." *Wilco v. Swan,* 346 U.S. 427, 436-37, 74 S.Ct. 182, 187-88, 98 L.Ed. 168 (1953) (emphasis added) (footnote omitted). Although the "manifest disregard of law" standard is not easily defined, *see San Martine Compania de Navegacion, S.A. v. Saguena Terminals Ltd.,* 293 F.2d 796, 801 n. 4 (9th Cir. 1961), it is clear it has not been met in this case.

[4] By the very terms of the rule of deferential review, mere error in interpretation of California law would not be enough to justify refusal to enforce the arbitrators' decision. Moreover, it is far from evident that the arbitrators misread California law at all. No California case clearly contrary to the arbitrators' interpretation has been called to our attention. It was not unreasonable for the arbitrators to distinguish the cases upon which Northrop relied on the ground stated by the arbitrators.[7] The district court's analogy to *Industrial Development & Land Co. v. Goldschmidt,* 56 Cal.App. 507, 206 P. 134 (1922), was misplaced; in that case the law claimed to make performance illegal was not foreign law but the eighteenth amendment, which was as controlling in California as if it had been a California statute or constitutional provision.

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[7]The interpretation of Section 1511 the arbitrators adopted appears to be consistent with the general rule. "Impossibility based on foreign law does not fall within the same class as that occasioned by domestic law, and it has generally been held no excuse for breach of contract." W. Jaeger, 18 Williston on Contracts § 1938 at 42-43 (3rd ed. 1978). Such impossibility is not treated as impossibility of law, but as impossibility "of fact." *Id* at 43.

The district court examined the language and history of Saudi Arabia Decree No. 1275 in some detail and concluded that it probibited the payment of the commissions involved in this case. 593 F.Supp. at 938. But as we have said, the question was whether payment was prohibited under California law, not Saudi law, and the answer to that question turned not upon whether Decree No. 1275 stated a rule of Saudi law under which the payment would be illegal, but rather upon whether the existence of such a rule in Saudi law excused performance under California Civil Code § 1511.

[5] Northrup also argues that if the Saudi Decree did not excuse performance of the Marketing Agreement under California Civil Code § 1511, the choice-of-law clause in the Agreement should be set aside and the Saudi Decree should be applied directly to invalidate the Marketing Agreement under the principle announced in Restatement (Second) of Conflicts § 187(2)(b)(1971).[8] However, choice-of-law and choice-of-forum provisions in international commercial contracts are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," and should be enforced absent strong reasons to set them aside. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-20, 94 S.Ct. 2449, 2455-57, 41 L.Ed.2d 270 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92

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[8]The Restatement provides:

> § 187. Law of the State Chosen by the Parties (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . .
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue . . . .

S.Ct. 1907, 32 L.Ed. 513 (1972). We agree with the arbitrators that the general principle of conflicts Northrop cites is not sufficient standing alone to overcome the strong policy consideration announced in *Scherk* and *Bremen*.

IV

Northrop argues the courts should not enforce the Marketing Agreement because to do so would be contrary to public policy. As noted earlier, this is a question for the courts alone to decide. *W.R. Grace*, 461 U.S. at 766, 103 S.Ct. at 2183.

Northrop contends the central question upon which this appeal turns is one of public policy. Northrop argues "that California law, as a matter of public policy, prohibits enforcement of a contract where performance of the contract would be illegal under the law of a foreign state. This rule is codified in California Civil Code § 1511 . . . ." Appellee's Brief at 29.

[6] Section 1511 appears in California's codification of the law of contracts, under the heading "Extinction of Obligations." Cal.Civ.Code § 1511 (West 1982). We do not regard section 1511 as a declaration that it is the public policy of the state of California that contracts unenforceable under the laws of any other jurisdiction shall not be enforced in California. Section 1511 is a codification of a rule of purely private law embodying a common-law defense in an action between contracting parties for breach. If the statutory codification of such rules of contract law were regarded as converting them into principles of public policy cognizable only in courts, the capacity of arbitrators to resolve contract disputes would be seriously diminished.

Northrop's argument that the courts should decline to enforce the Marketing Agreement because it conflicts with the public policy Saudi Arabia announced in Decree No. 1275 flies in the face of the parties' agreement that the law of California, and not Saudi Arabia, would determine the validity and construction of the contract. Northrop has cited no California regulation, statute, or court decision demonstrating that enforcement of a contract to pay commissions to a marketing representative is contrary to the public policy of California, whether such commissions are illegal under the law of a foreign state or not.

Northrop's most substantial argument is that the public policy reflected in Decree No. 1275 was also the policy of the United States Department of Defense. In its opinion the district court said "it is clear [the Department of Defense] wished to conform its policy precisely to that announced by Saudi Arabia." The court concluded that the Department's "enforcement of Saudi policy was coercive rather than voluntary, and is properly characterized as U.S. public policy." 593 F.Supp. at 936 n. 13.

[7] To justify refusal to enforce an arbitration award on grounds of public policy, the policy "must be well defined and dominant." *W.R. Grace*, 461 U.S. at 766, 103 S.Ct. at 2183. The Saudi Arabian policy the Department of Defense arguably adopted was neither. It is clear the Department wished to accommodate Saudi Arabian interests and sensibilities. It is also clear, however, that the Department was interested in encouraging sales to Saudi Arabia of American manufactured military equipment, and considered the efforts of Triad critical to that end. It is not clear from the evidence before the arbitrators and the district court what policy the Department of Defense adopted in pursuit of these sometimes inconsistent goals.

[8] Northrop calls attention to evidence indicating Saudi Arabia and the Department of Defense adopted a policy of prohibiting payment of commissions whether or not ultimately charged to the Saudi Arabian government. Triad argues from evidence indicating both Decree No. 1275 and Department of Defense policy were aimed at prohibiting commissions that added to the cost of Saudi procurement, and that in any event the Department of Defense was unable to determine the Decree's exact application, even assuming the Department wished to mirror its policy. The district court resolved the conflict in Northrop's favor, 593 F.Supp. at 936 n. 13, 937-38, but even if we were to agree, we could not say on this record the policy the Department adopted was "well defined and dominant." The district court's refusal to enforce the arbitrators' decision on the ground that it conflicted with the policy of the Department of Defense was, therefore, unwarranted.

REVERSED.

APPENDIX C-1

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed March 17, 1987]

NORTHROP CORPORATION,
Petitioner-
Respondent/Appellee,

vs.

TRIAD INTERNATIONAL MARKETING S.A.,
and TRIAD FINANCIAL ESTABLISHMENT,
Respondent-
Petitioner/Appellant.

No. 84-6480
D.C. No.
83-7945-AWT
CV 83-7948-AWT
(C.D. Cal.)

ORDER

Before: BROWNING, Chief Judge

Appellee's motion for an extension of time to and including April 1, 1987, to file a petition for rehearing and a suggestion for rehearing en banc is GRANTED.

/s/
Chief Judge

APPENDIX D-1

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 25, 1987]

NORTHROP CORPORATION,
Petitioner-
Respondent/Appellee,

vs.

TRIAD INTERNATIONAL MARKETING S.A.,
and TRIAD FINANCIAL ESTABLISHMENT,
Respondent-
Petitioner/Appellant.

No. 84-6480
D.C. Nos.
83-7945-AWT
CV 83-7948-AWT

ORDER

Before: BROWNING, Chief Judge, KENNEDY and HUG, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and suggestion for a rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On August 28, 1987, I served the within Petition for Writ of Certiorari in re: "Northrop Corporation vs. Triad International Marketing" in the United States Supreme Court, October Term 1987, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John R. McDonough
Ball, Hunt, Hart, Brown & Baerwitz
450 North Roxbury Drive
Beverly Hills, California 90210

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 28, 1987, at Los Angeles, California

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